

EXHIBIT A

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

* * *

JAMES HAYDEN,

Plaintiff,

vs.

CASE NO. 1:17-cv-002635-CAB

2K GAMES, INC. and
TAKE-TWO INTERACTIVE
SOFTWARE, INC.,

Defendants.

* * *

Deposition of E. DEBORAH JAY, PhD,
a witness herein, called by the plaintiff for
examination pursuant to the Federal Rules of
Civil Procedure, taken before me, Patti
Stachler, RMR, CRR, a Notary Public within and
for the State of Ohio, at 216 Selby Lane,
Atherton, California, on August 24, 2021, at
10:30 a.m. EST.

* * *

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1 A. I've been designated an expert --
2 as a survey expert to testify about a survey I
3 believe in about 12 cases on behalf of
4 Kirkland & Ellis, but that's an estimate. I've
5 conducted hundreds of surveys for many, many
6 law firms, and so that's just the best estimate
7 I have.

8 Q. Okay. Now, do you use constant
9 sum scaling for any of those surveys?

10 A. No.

11 MS. MEANS: Objection. Outside the
12 scope.

13 BY MR. ALEXANDER:

14 Q. Have you ever been excluded in any
15 of those cases?

16 A. I've -- when I've been retained as
17 an expert and -- when I've been retained as an
18 expert, I've never been excluded when I've
19 conducted a survey.

20 Q. Have you ever been excluded when
21 you haven't been retained as an expert?

22 MS. MEANS: Objection. Vague. Form.
23 Outside the scope. Overbroad.

24 A. I've never had a survey that I
25 conducted and I was retained excluded.

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1 BY MR. ALEXANDER:

2 Q. Have you ever had a survey that
3 you've helped prepare excluded in a case?

4 MS. MEANS: Asked and answered.

5 A. I don't help other people prepare
6 surveys for litigation. The only surveys that
7 I work on for litigation are surveys that I
8 conduct myself.

9 BY MR. ALEXANDER:

10 Q. Do you remember the first case in
11 which you were engaged as an expert to testify
12 in a case?

13 A. Yes.

14 MS. MEANS: Objection. Outside the
15 scope.

16 BY MR. ALEXANDER:

17 Q. When was that?

18 A. It was in 1991, I believe.

19 Q. Do you remember the name of the
20 case?

21 A. Yes. It was Intel versus AMD.

22 Q. And did you conduct a survey?

23 A. Not in that case.

24 Q. Do you remember the first case in
25 which you were retained as an expert and

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1 Q. And the first one was to determine
2 the reasons for buying an NBA 2K video game,
3 correct?

4 A. Yes.

5 Q. Was it your objective to determine
6 all the reasons people purchased the games?

7 MS. MEANS: Objection. Form.

8 A. Yes. Some of the questions went
9 to all the reasons why people bought the video
10 games. Other questions went to specific
11 reasons why people bought the video games. But
12 the first two questions clearly related to all
13 the reasons.

14 BY MR. ALEXANDER:

15 Q. Are you confident that the
16 respondents who answered the first two
17 questions listed all the reasons they purchased
18 the NBA 2K video games?

19 MS. MEANS: Objection. Form. Vague
20 and ambiguous. Foundation.

21 A. Well, I asked follow-up questions,
22 so I'm confident that I got the reasons why
23 people purchased the video games.

24 BY MR. ALEXANDER:

25 Q. Well, let's just talk about the

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1 first two questions. Are you confident that
2 the respondents who answered those questions
3 listed all of the reasons they purchased the
4 NBA 2K video games?

5 MS. MEANS: Objection. Form. Vague
6 and ambiguous. Foundation.

7 A. I believe that people described
8 the reasons. Sometimes those reasons were
9 general. And the -- but I believe they
10 described the reasons why they purchased it. I
11 believe the subsequent questions clarified the
12 responses to the extent that the initial
13 responses were general, but, also, I believe
14 the subsequent questions likely collected
15 information not just about the reasons why
16 people purchased it, but because they were
17 closed-ended, and closed-ended questions tend
18 to be more suggestive. I believe they
19 collected information about what people liked
20 about the game, not just the reasons why they
21 bought it.

22 So I believe the most accurate
23 information about why people buy the game was
24 captured in the first two open-ended questions,
25 and then in the follow-up questions it

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1 collected information about people, what
2 they -- why they buy it, but, also, really what
3 they like about the game. Because we gave very
4 specific responses.

5 So people often buy things for
6 very general reasons, but when you give them a
7 closed-ended question with a list of very
8 specific responses, they select them because --
9 especially in a case like this where people buy
10 it and they continue to play the game. So they
11 think, you must want to know what I like about
12 the game, not just why I bought it.

13 So I think the first questions,
14 the open-ended, are the most reliable indicator
15 of why people bought it, and the subsequent
16 questions tell you not just why they bought it
17 but what people like about the games.

18 BY MR. ALEXANDER:

19 Q. Do you think the first questions
20 are the most reliable indicator of all the
21 reasons the respondents bought the NBA 2K
22 games?

23 MS. MEANS: Objection. Asked and
24 answered. Form. Foundation.

25 A. I think they are the best

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1 was important to depict the tattoos on LeBron
2 James, much less the portion -- the name Gloria
3 on his right shoulder or the stars above the
4 beast tattoo on his left shoulder. So nobody
5 mentioned the tattoos or the specific portion
6 of Mr. James' tattoos that I understand were
7 inked by Mr. Hayden.

8 BY MR. ALEXANDER:

9 Q. Can you turn to page 8 of your
10 report?

11 A. Yes.

12 Q. And just to be clear before I move
13 on, when you were the survey expert on the
14 plaintiff's behalf in the case involving the
15 date-picker feature, you did include the name
16 of the date-picker functionality in your survey
17 in that case, correct?

18 MS. MEANS: Objection. Form.
19 Outside the scope. Foundation.

20 A. The purpose of that survey was
21 completely different than the purpose of this
22 survey. So it was a completely different
23 purpose. And, also, there have been some
24 cases, Laser Dynamics and some other cases,
25 that have opined about surveys that are done in

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1 patent infringement and apportionment cases.
2 So some of those opinions have also -- I forget
3 the names of some of the cases, but -- so I've
4 also -- so the purpose of the survey is very
5 different, and certainly the cases in patent
6 litigation have also suggested, you know,
7 certain approaches are better than other
8 approaches.

9 So the survey I believe in the
10 Lucent case was over a decade ago. And so I
11 follow Court opinions, I follow the literature,
12 but, also, I tailor the survey to the product
13 at issue. And I ask the survey the same way,
14 if the purpose is the same, for plaintiffs and
15 defendants, but that was a different product, a
16 different purpose, and before there were a
17 number of Court opinions relating to
18 apportioning damages in a patent infringement
19 case.

20 So I don't think that survey has
21 any relevance, but I just point out that there
22 are very few ways to enter the date of an
23 appointment -- or there used to be item. So
24 it's not like there's dozens and dozens of
25 attributes and tendencies of players. It's a

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1 very different product. So I don't think
2 there's anything analogous about that, just
3 like -- I mean, a video game, the NBA 2K video
4 game is very, very different.

5 BY MR. ALEXANDER:

6 Q. Yeah, the purpose of that survey,
7 you testified earlier, was to determine if
8 people used the date-picker function rather
9 than other functions for picking the date in
10 Microsoft, correct?

11 MS. MEANS: Objection. Form.
12 Mischaracterizes the testimony.

13 A. Again, I don't remember the survey
14 completely. It's been a long time. It's been
15 over a decade since I did it. So I'd be happy
16 to come back and be review the survey, but it's
17 been a long time, but I know it was a different
18 purpose. And I've often and routinely
19 conducted surveys the way I conducted the
20 survey in this case.

21 And, in fact, the most common way
22 to do surveys, not just for litigation when
23 you're trying to find out why somebody did
24 something, is to ask open-ended questions, and
25 that would be true for companies like Peterbilt

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1 right?

2 MS. MEANS: Objection. Form.

3 A. Yes.

4 BY MR. ALEXANDER:

5 Q. And 21 percent selected the
6 soundtrack?

7 MS. MEANS: Objection. Form.

8 A. Yes.

9 BY MR. ALEXANDER:

10 Q. Does the overall quality of the
11 graphics include tattoos?

12 MS. MEANS: Objection. Form.

13 A. Typically quality of graphics goes
14 to the pixelation, the precision, the -- you
15 know, how good the picture is. So it's really
16 the quality, the way a television, HGTV, or
17 what the resolution is. That's what typically
18 in video games how clear, precise the graphics
19 are.

20 BY MR. ALEXANDER:

21 Q. So is clear, precise images on the
22 television from the game, correct?

23 MS. MEANS: Objection. Form. Vague
24 and ambiguous.

25 A. It's the quality of the graphics